



**FEDERAL COURT OF AUSTRALIA
PRINCIPAL REGISTRY**

LEVEL 16
LAW COURTS BUILDING
QUEENS SQUARE
SYDNEY NSW 2000

12 April 2022

Terens
Right to Know

By email: foi+request-8401-f7693fc3@righttoknow.org.au

Dear Sir/Madam,

Request under the Freedom of Information Act

I refer to your email to the Federal Court of Australia (**Court**) dated 10 February 2022 requesting access to documents under the *Freedom of Information Act 1982* (Cth) (**FOI Act**). Specifically, you have requested the following:

According to an article in the Australian (Federal Court boss warned on job rule sidestep) appointments to the National Judicial Registrar positions (of which, according to the article, there were eight) in the Federal Court were proper because “the recruitment processes which resulted in the appointment of eight registrars because there had been ‘a role review process that had resulted in certain positions being found suitable for either a Legal 2 or (SES1) position, depending on the relative complexity and workload.’” The article claims that “Some internal promotions, the special deals known as individual flexibility arrangements show, were given pay rises of around \$50,000 a year despite ostensibly remaining at the same level.”

...

I request copies of the individual flexibility arrangements entered into by those non-SES National Judicial Registrars referred to in the article.

I want to know how much money was thrown at these non-SES National Judicial Registrars and what the terms of the arrangements were.

You are welcome to redact the names of the relevant registrars, as well as their signatures. Please do not redact any date information or the terms of the arrangements.

On 24 February 2022, the Court acknowledged receipt of your FOI request and advised you that, because your request covered documents that contained personal information about individuals, under section 27A of the FOI Act the Court was required to consult with the persons concerned before making a decision about the release of the documents. For that

reason, the period for processing your request was extended by a further period of 30 days in accordance with subsection 15(6) of the FOI Act.

Authorised decision-maker

I am authorised under section 23 of the FOI Act to make decisions on behalf of the Court in relation to requests made under the FOI Act.

Decision

I have decided to refuse access to the documents you have requested on the basis that those documents are conditionally exempt from disclosure under subsections 47E(c), 47E(d) and section 47F of the FOI Act and, further, disclosure of the documents would be contrary to the public interest under subsection 11A(5). I also consider that it would be futile to grant you access to redacted copies of the documents under section 22 of the FOI Act.

I have taken the following into account in making my decision:

- the terms of your request;
- the nature and content of the documents sought by your request;
- the relevant provisions of the FOI Act and relevant case law;
- the third party submissions received following consultations under section 27A of the FOI Act;
- the *Freedom of Information (Charges) Regulations 2019*; and
- the FOI Guidelines issued by the Office of the Australian Information Commissioner (**FOI Guidelines**).

Reasons for Decision

Searches undertaken

Extensive searches were undertaken by senior staff in the Court's People and Culture team, and other staff, to identify any documents falling within the scope of your request. These searches included searches of the Court's human resources and recruitment inboxes, searches of staff emails, searches of the human resources shared drive, and searches of the Court's electronic document, records management and information systems. As a result of the searches undertaken, eight (8) individual flexibility agreements (**IFAs**), which you refer to in your request as "individual flexibility arrangements", were found.

Certain operations of agencies – s 47E of the FOI Act

I consider that the documents falling within the scope of your request, being eight (8) IFAs, are conditionally exempt under paragraphs 47E(c) and 47E(d) of the FOI Act, which prescribe that:

A document is conditionally exempt if its disclosure under this Act would, or could reasonably be expected to, do any of the following:

- ...
- (c) have a substantial adverse effect on the management or assessment of personnel by the Commonwealth or by an agency;*
 - (d) have a substantial adverse effect on the proper and efficient conduct of the operations of an agency.*

The FOI Guidelines provide the following elaboration on paragraph 47E(c):

6.113 Where the document relates to the agency's policies and practices relating to the assessment and management of personnel, the decision maker must address both elements of the conditional exemption in s 47E(c), namely, that:

- an effect would reasonably be expected following disclosure*
- the expected effect would be both substantial and adverse.*

6.114 For this exemption to apply, the documents must relate to either:

- the management of personnel – including the broader human resources policies and activities, recruitment, promotion, compensation, discipline, harassment and occupational health and safety*
- the assessment of personnel – including the broader performance management policies and activities concerning competency, in-house training requirements, appraisals and underperformance, counselling, feedback, assessment for bonus or eligibility for progression.*

The IFAs captured by your FOI request are clearly related to the “management of personnel”, given they are specifically related to the compensation and recruitment of Court employees, and the “assessment of personnel”, given the compensation provided for in the IFAs reflects the skills, knowledge, experience and attributes of those particular employees.

The FOI Guidelines provide the following elaboration on paragraph 47E(d):

6.123 The predicted effect must bear on the agency's 'proper and efficient' operations, that is, the agency is undertaking its expected activities in an expected manner. Where disclosure of the documents reveals unlawful activities or inefficiencies, this element of the conditional exemption will not be met and the conditional exemption will not apply.

The release of the IFAs captured by your request would clearly bear on the Court's “*proper and efficient operations*”, given that the IFAs contain personal information about Registrars of the Court who are critical to the Court's proper and efficient operations. Registrars provide support to the Court's Judges, as well as exercising various powers delegated by Judges and performing important statutory functions assigned to them by legislation. In addition, the release of the IFAs would impact the Court's future recruitment processes which would bear on the Court's “*proper and efficient operations*” going forward. The “*substantial adverse effect*” that would be caused by the release of the IFAs on both the Registrars concerned and the Court more generally is discussed below.

I now turn to the question of whether disclosure of the documents would or could reasonably be expected to have a substantial adverse effect on the management and assessment of Court staff and on the Court's proper and efficient conduct of operations.

The IFAs contain specific details of the terms and conditions of employment which have been negotiated directly, and on an individual basis, between those employees and the Chief Executive Officer/Principal Registrar (CEO) of the Court. The release of the precise details of the IFAs, which includes the specific remuneration negotiated for each employee, would reasonably be expected to have a substantial adverse effect on the management and assessment of personnel by the Court, as well as on the Court's operations by:

- destroying trust in the Court's recruitment processes and the confidentiality of negotiations between employees/prospective employees and the Court;
- undermining the expectations of Court employees regarding the protection of their privacy and the confidentiality of the terms of their employment;
- lowering the morale of employees and leading to deterioration in employee productivity and performance due to the negative impact that disclosure would have on employee trust and confidence in the Court;
- discouraging future external and internal candidates from applying for job vacancies or promotions at the Court on the basis that candidates will not have confidence that their individual employment arrangements will remain confidential;
- discouraging employees and prospective employees from seeking to pursue the additional benefits conferred by IFAs which could deter high-calibre candidates from applying for vacancies or promotions at the Court in future; and
- permitting remuneration comparisons between employees of the Court and thus creating tension and potential animosity between employees.

In relation to the substantial adverse effect that disclosure of the IFAs would have on the trust and morale of employees of Court, I note that each employee I consulted in relation to the IFAs objected to disclosure of the relevant IFA in full. It was clear from that consultation that each employee who entered into an IFA with the Court did so on the understanding that the sensitive information contained in the IFA would not be communicated to third parties and, furthermore, would not be made publically available on a website (whether that be via the Right to Know website or the Court's FOI disclosure log). The majority of employees who were consulted commented on the adverse impact that disclosure would have on their work performance, as well as relationships with their colleagues. The responses highlighted the substantial adverse effect that disclosure would have on the Court's management of its personnel and, given the number of employees who would be directly impacted by disclosure of the relevant IFAs, it also demonstrates the substantial adverse effect that disclosure would have on the proper and efficient conduct of the operations of the Court generally.

In relation to employee expectations of confidentiality and privacy discussed above, I note that there is no legislative or regulatory regime that requires the disclosure of the documents

requested.¹ Rather, disclosure of the information requested would likely breach the Court's obligations in respect of privacy and confidentiality of employee records.

Moreover, your access request has been made in the context of the recent publication of articles in *The Australian* concerning the Court's recruitment practices, including one article specifically referred to in your FOI request. If the sensitive information contained in the IFAs is made public, it would expose the employees concerned to the risk of their personal details and the circumstances of their recruitment being the subject of further media attention, which would likely cause significant stress and anxiety for the individuals concerned.. The resulting impact this would have on the performance and morale of Court employees would, in turn, have a substantial adverse effect on the Court's management of personnel and on the Court's proper and efficient conduct of its operations.

Finally, given what is discussed above, including the remuneration comparison that would result from disclosure of the IFAs, it would reasonably be expected that the disclosure of the documents would lead to animosity and disharmony between Court employees, and could result in employees choosing to leave the employ of the Court, causing the Court to lose the talent it obtained during its extensive recruitment processes.

For the reasons above, I have determined that the documents captured by your request are conditionally exempt under subsections 47E(c) and 47E(d) of the FOI Act.

In finding that the documents are conditionally exempt, I am required to consider whether it would be contrary to the public interest to give you access at this time. I discuss this later in my decision.

Personal privacy – s 47F of the FOI Act

I consider that the documents that fall within the scope of your request are conditionally exempt from disclosure under subsection 47F(1) of the FOI Act, which prescribes that:

A document is conditionally exempt if its disclosure under this Act would involve the unreasonable disclosure of personal information about any person (including a deceased person).

The term “*personal information*” is defined in subsection 4(1) of the FOI Act to have the same meaning as in section 6 of the *Privacy Act 1988* (Cth), that is:

...information or an opinion about an identified individual, or an individual who is reasonably identifiable:

- (a) whether the information or opinion is true or not; and*
- (b) whether the information or opinion is recorded in material form or not.*

¹ Noting that general remuneration details are published in the Court's Annual Report in relation to each classification level.

The IFAs captured by your FOI request contain “*personal information*” that includes the names, signatures, income, period of employment, applicable allowances, and dates of the agreements entered into with those employees.

Although you expressed a willingness in your FOI request “*to redact the names of the relevant registrars, as well as their signatures*”, the IFAs would still contain information about individuals who are reasonably identifiable. For example, the dates of the documents may be able to be compared with other publicly available information to reconstruct the start date of employment and therefore identify the particular individual concerned. Furthermore, given the quote from *The Australian* extracted in your FOI request which refers to the Court’s 2018 recruitment process resulting in “*the appointment of eight registrars*”, it is certainly possible for current and/or past employees of the Court (and potentially others) to identify which Registrars are the subject of the IFAs captured by your FOI request. Accordingly, I consider that each of the IFAs, even with names and signatures redacted, contains “*personal information*” about public servants.

To determine whether this personal information is conditionally exempt under subsection 47F(1), I am required to consider whether disclosure of that personal information would be unreasonable.

Subsection 47F(2) of the FOI Act prescribes that:

In determining whether the disclosure of the document would involve the unreasonable disclosure of personal information, an agency or Minister must have regard to the following matters:

- (a) the extent to which the information is well known;*
- (b) whether the person to whom the information relates is known to be (or to have been) associated with the matters dealt with in the document;*
- (c) the availability of the information from publicly accessible sources;*
- (d) any other matters that the agency or Minister considers relevant.*

In considering what is unreasonable, the AAT in *Re Chandra and Minister for Immigration and Ethnic Affairs* [1984] AATA 437 at 259 stated that:

...whether a disclosure is ‘unreasonable’ requires ... a consideration of all the circumstances, including the nature of the information that would be disclosed, the circumstances in which the information was obtained, the likelihood of the information being information that the person concerned would not wish to have disclosed without consent, and whether the information has any current relevance...it is also necessary in my view to take into consideration the public interest recognised by the Act in the disclosure of information ... and to weigh that interest in the balance against the public interest in protecting the personal privacy of a third party...

The FOI Guidelines list at paragraph 6.143 additional factors, which are outlined in the leading Information Commissioner review decision on section 47F. In that decision, ‘*FG*’ and *National Archives of Australia* [2015] AICmr 26, the Information Commissioner held that the following factors are relevant to the question of whether disclosure would be unreasonable:

- *the nature, age and current relevance of the information*
- *any detriment that disclosure may cause to the person to whom the information relates*
- *any opposition to disclosure expressed or likely to be held by that person*
- *the circumstances of an agency's collection and use of the information*
- *the fact that the FOI Act does not control or restrict any subsequent use or dissemination of information released under the FOI Act*
- *any submission an FOI applicant chooses to make in support of their application as to their reasons for seeking access and their intended or likely use or dissemination of the information, and*
- *whether disclosure of the information might advance the public interest in government transparency and integrity.*

Every employee who was consulted under section 27A of the FOI Act strongly objected to the release of their personal information contained in the relevant IFA. The reasons given for the objections included:

- the information relates to their personal financial affairs, which the Australian community would regard as sensitive;
- the information is a confidential communication between the employee and the CEO in relation to the terms of the person's employment, and is not well known nor available from publicly accessible sources;
- disclosure would have an adverse effect on the people concerned, including on their reputation at the Court;
- release of the information contained in the documents, especially the remuneration, would negatively impact on the employee's relationships with their peers and colleagues; and
- disclosure would undermine the morale of the people concerned, and potentially the workforce as a whole, by not protecting their privacy rights.

I consider that the reasons listed above are well-founded and I give considerable weight to each of them in determining whether disclosure of the personal information would be unreasonable.

In relation to the question of whether disclosure would be unreasonable, the FOI Guidelines further provide, at paragraphs 6.144 and 6.145:

For example, in Colakovski v Australian Telecommunications Corp, Heerey J considered that '... if the information disclosure were of no demonstrable relevance to the affairs of government and was likely to do no more than excite or satisfy the curiosity of people about the person whose personal affairs were disclosed ... disclosure would be unreasonable'. This illustrates how the object of the FOI Act of promoting transparency in government processes and activities needs to be balanced with the purpose of s 47F to protect personal privacy, although care is needed to ensure that an FOI applicant is not expected to explain their reason for access contrary to s 11(2).

Disclosure that supports effective oversight of government expenditure may not be unreasonable, particularly if the person to whom the personal information relates may have reasonably expected that the information would be open to public scrutiny in future. On the other hand, disclosure may be unreasonable if the person provided the information to Government on the understanding that it would not be made publicly available, and there are no other statutory disclosure frameworks that would require release of the information.

As discussed above, the IFAs contain personal information including personal financial information, and were entered into by the relevant employees on the understanding that such information would not be disclosed to third parties or made publically available on a website. The Court has significant obligations with respect to the confidentiality of employee records, including those relating to remuneration. None of the documents requested are disclosed to anyone other than authorised staff, the Australian Taxation Office where required by law, or to the relevant employee themselves. There are no other statutory disclosure frameworks that require release of that information. I consider that disclosure of the precise salaries of individual employees would not contribute to the effective oversight of government expenditure any more than the general remuneration details that are published in the Court's Annual Report, to which you are already able to access.

In relation to any detriment that disclosure of the information could cause to the people to whom the information relates, I consider it highly likely that the personal information contained in each IFA would have adverse consequences for the individuals concerned. In particular, the disclosure of salaries could create stress and anxiety for the individuals concerned and cause tension and disharmony in the workplace by permitting comparisons between employees. These effects would, or could reasonably be expected, to include those discussed in respect of section 47E above such as destroying employee's trust in the confidentiality of negotiations, creating tensions between individual employees, and undermining the morale of employees. Other current and prospective employees may also lose trust and confidence in the ability of the Court to maintain confidentiality over their personal information.

I am not satisfied that there exists or should exist any presumption that such documents should be released merely because each employee is an employee of the Court and a public servant. The personal information is not information about the performance of the usual duties or responsibilities of individual employees of the Court. Rather, the information contained in the IFAs is personal, confidential and sensitive in nature. The recent publication of articles in *The Australian* concerning the Court's recruitment practices in 2018 exacerbates the likelihood and seriousness of any detriment to be caused to the individual employees by the release of the documents requested. Some of the employees consulted about the release of the IFAs raised particular concerns about media articles that may flow from disclosure of the IFAs and the resulting stress, anxiety and negative impact this will have on them, including in their relationships with colleagues and their standing in the wider legal community.

In determining whether disclosure of the IFAs would be unreasonable, the fact that the FOI Act "*does not control or restrict any subsequent use or dissemination of information released*" (per paragraph 6.143 of the FOI Guidelines above) is also an important consideration. In '*BA*'

and Merit Protection Commissioner [2014] AICmr 9 (30 January 2014), the Australian Information Commissioner held at paragraph 81:

... the FOI notion of 'disclosure to the world at large' has different meaning with developments in information technology. It is now considerably easier for a person who has obtained information under the FOI Act to disseminate that information widely, to do so anonymously and to comment upon or even alter that information ... Material that is published on the web may remain publicly available for an indefinite period. It may cause anxiety to a public servant that material about their suitability for a particular appointment can be publicly available long after the appointment and to an indeterminate audience.

The information in the IFAs is not well known and is not available from publicly accessible sources. The release of such information into the public domain has the potential to cause considerable harm and distress for the people concerned.

For all of the above reasons, I consider that the personal information contained in the IFAs would be unreasonable to disclose and is therefore conditionally exempt under section 47F of the FOI Act.

Public interest test

In finding that the documents are conditionally exempt under paragraphs 47E(c), 47E(d) and section 47F of the FOI Act, I must now consider whether, as a result of subsection 11A(5) of the Act, it would be contrary to the public interest to give you access at this time. In this regard, subsection 11A(5) of the FOI Act provides:

The agency or Minister must give the person access to the document if it is conditionally exempt at a particular time unless (in the circumstances) access to the document at that time would, on balance, be contrary to the public interest.

Subsection 11B(3) of the FOI Act lists factors that must be taken into account in considering the public interest test as follows:

Factors favouring access to the document in the public interest include whether access to the document would do any of the following:

- (a) promote the objects of this Act (including all the matters set out in sections 3 and 3A);*
- (b) inform debate on a matter of public importance;*
- (c) promote effective oversight of public expenditure;*
- (d) allow a person to access his or her own personal information.*

Subsection 11B(4) of the FOI Act lists factors that must not be taken into account in deciding whether access would be in the public interest. I have not considered those factors.

The FOI Guidelines provide non-exhaustive lists of other factors favouring disclosure (see paragraph 6.19) and against disclosure (see paragraph 6.22) that may be relevant in certain

circumstances. Included in the factors weighing against disclosure in paragraph 6.22 of the FOI Guidelines are the following:

- (h) could reasonably be expected to prejudice an agency's ability to obtain confidential information*
- (i) could reasonably be expected to prejudice an agency's ability to obtain similar information in the future*
- ...
- (k) could reasonably be expected to harm the interests of an individual or group of individuals*
- ...
- (n) could reasonably be expected to prejudice the management function of an agency*

In relation to the harm that may result from disclosure, the FOI Guidelines state at paragraphs 6.20 and 6.21:

The FOI Act does not list any factors weighing against disclosure. These factors, like those favouring disclosure, will depend on the circumstances. However, the inclusion of the exemptions and conditional exemptions in the FOI Act recognises that harm may result from the disclosure of some types of documents in certain circumstances; for example, where disclosure could prejudice an investigation, unreasonably affect a person's privacy or reveal commercially sensitive information. Such policy considerations are reflected in the application of public interest factors that may be relevant in each particular case.

Citing the specific harm defined in the applicable conditional exemption is not itself sufficient to conclude that disclosure would be contrary to the public interest. However, the harm is an important consideration that the decision maker must weigh when seeking to determine where the balance lies.

Having regard to the relevant factors, I accept that disclosure of the IFAs might broadly promote the objects of the FOI Act by providing to the Australian community access to information held by the Government, increasing knowledge about Government activities and enhancing the scrutiny of Government decision-making. Disclosure may also promote oversight of public expenditure, by revealing the remuneration paid to particular public servants. However, I consider that disclosure of the remuneration for each relevant employee would not serve the public interest any more than the general remuneration details that are publicly accessible in the Court's Annual Report. Little weight should, therefore, be given to these factors.

Whilst disclosure of the IFAs would promote the objects of the FOI Act, there are several factors already identified that weigh against a finding that it would be in the public interest to disclose the IFAs. The factors against disclosure are that the release of the documents could reasonably be expected to:

- prejudice the protection of the public servants' right to privacy;

- prejudice the management function of the Court by destroying trust in the Court's recruitment processes and the confidentiality of negotiations between employees/prospective employees and the Court;
- substantially affect the operations of the Court in terms of its ability to recruit and retain high calibre personnel;
- harm the interests of the individuals to whom the IFAs relate, including in relation to their individual wellbeing and their relationships with colleagues;
- discourage employees and prospective employees from seeking to pursue the additional benefits that might be conferred by IFAs;
- permit remuneration comparisons between employees of the Court and, consequently, create tension and animosity between employees;
- lower the morale of employees and lead to deterioration in employee productivity and performance due to the negative impact that disclosure would have on employee trust and confidence in the Court;
- adversely affect the individuals concerned in relation to their reputation at the Court and in the wider legal community; and
- cause distress and anxiety for the individuals concerned in relation to media attention that may follow the release of the documents.

Paragraph 6.5 of the FOI Guideline provides elaboration on the public interest test including, relevantly, that the public interest is “*not something of interest to the public, but in the interest of the public*”.² While there might be a recognised public interest in the general remuneration details for each classification level of Court employees, those details are published in the Court's Annual Report and accessible by the public. I am unable to see how information regarding a particular employee's terms of employment and salary – which is personal and unique to the person concerned – would be of serious concern or benefit to the public. Disclosure of that level of personal information would, in my view, merely serve to satisfy the curiosity of others.

I consider that the factors against disclosure (set out above) carry with them a very real and grave risk of harm to the Court and its employees should the personal information in the IFAs be released. I give significant weight to each of the above factors and, after considering each factor and the weight to be given to each, I have concluded that the benefit to the public resulting from disclosure is outweighed by the benefit to the public of withholding that information.

Accordingly, I give the factors against disclosure greater weight than the factors favouring disclosure. I am satisfied that disclosure of the personal information in the IFAs would, on balance, be contrary to the public interest. For all the reasons outlined above, and as already stated, I have decided to refuse your request on the basis that the documents requested are exempt from disclosure under subsections 47E(c), 47E(d) and section 47F of the FOI Act and that disclosure would be contrary to the public interest under subsection 11(5).

² See also *Johansen v City Mutual Life Assurance Society Ltd* (1904) 2 CLR 186, at [188] (Griffiths CJ).

Deletion of exempt matter or irrelevant material – s 22 of the FOI Act

Section 22 of the FOI Act requires an agency to provide access to an edited version of a document where it is reasonably practicable to edit the document to remove exempt material or material that is irrelevant to the scope of a request.

In relation to section 22 of the FOI Act, the FOI Guidelines explain, at paragraph 3.98:

Applying those considerations, an agency or minister should take a common sense approach in considering whether the number of deletions would be so many that the remaining document would be of little or no value to the applicant. Similarly, the purpose of providing access to government information under the FOI Act may not be served if extensive editing is required that leaves only a skeleton of the former document that conveys little of its content or substance.

In your request, you say that you agree “to redact the names of the relevant registrars, as well as their signatures”, but ask the Court to “not redact any date information or the terms of the arrangements.”

I consider that, under section 22, upon redacting the exempt information due to the conditional exemptions discussed above, the documents retain no value or meaning. It would therefore be futile to grant you access to redacted copies of the documents.

Charges

You have not been charged for the processing of your request.

Your Review Rights

If you are dissatisfied with my decision, you may apply for internal review or to the Information Commissioner for review of those decisions. I encourage you to seek internal review as a first step as it may provide a more rapid resolution of your concerns.

Internal review

Under section 54 of the FOI Act, you may apply in writing to the Court for an internal review of my decision. The internal review application must be made within 30 days of the date of this letter.

Where possible please attach reasons as to why you believe review of the decision is necessary. The internal review will be carried out by another officer within 30 days.

Information Commissioner review

Under section 54L of the FOI Act, you may apply to the Australia Information Commissioner to review my decision. An application for review by the Information Commissioner must be

made in writing within 60 days of the date of this letter and be lodged in one of the following ways:

online: <https://forms.business.gov.au/aba/oaic/foi-review-/>

email: enquiries@oaic.gov.au

post: GPO Box 2999, Canberra ACT 2601

in person: Level 3, 175 Pitt Street, Sydney NSW

More information about the Information Commissioner review is available on the Office of the Australian Information Commissioner website at: <https://www.oaic.gov.au/freedom-of-information/reviews-and-complaints/information-commissioner-review/>.

Yours sincerely,

A handwritten signature in dark ink, appearing to be 'C Hammerton Cole', written in a cursive style.

C Hammerton Cole
Registrar